IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: HCV 02938 OF 2006

BETWEEN	SHAQUILLE FORBES (An infant who sues by his mother and Next Friend, KADINA LEWIS)	CLAIMANT
AND	RALSTON BAKER	1ST DEFENDANT
AND	ANDREW BENNET	2ND DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	3RD DEFENDANT

Mrs. Nicole Haynes instructed by Kinghorn and Kinghorn for the Claimant. Mrs. Gail Mitchell instructed by the Director of State Proceedings for the 2nd and 3rd Defendants

February 15, 16, 18 and 24; March 3 and 10, 2011

Assessment of Damages – Personal Injury – Proof of Special Damages

Amendment to Particulars of Claim after close of evidence and submissions, but before judgment

FRASER J.

1. These are the reasons for my judgment delivered on March 3, 2011.

THE BACKGROUND TO THE CLAIM

2. The claimant Shaquille Forbes who claims by his mother and next friend Kadina Lewis, was born on the 1st day of April 2004. On the 15th day of April 2005 the claimant was traveling to Mandeville in a taxi driven by the 1st defendant when it was involved in an accident with another motor vehicle being driven by the 2nd defendant.
3. When the claim was first filed on August 16, 2006 the particulars averred that the owner of the car driven by the 2nd defendant was one Byron Lewis who was then joined as the 3rd defendant. It was subsequently discovered the 2nd defendant is a police officer and that the car he was driving is owned by the Jamaica Constabulary Force.

4. This discovery led to the amendment of the Claim Form and the Particulars of Claim to remove therefrom the name Byron Lewis and substitute therefor as 3rd defendant, the Attorney General of Jamaica. The amended Claim Form and Particulars of Claim were filed on April 1, 2009. I shall return later to the issue of the amendments to the Particulars of Claim. Errors were made in that process which required, at the prompting of the court, further amendment after all the evidence and submissions were completed, but before judgment.
5. On April 2, 2009 the Attorney General was served with the amended Claim Form and amended Particulars of Claim. On February 4, 2010 pursuant to an Order granting the 3rd defendant leave, the 3rd defendant filed a Defence out of time. The Defence admitted liability and was limited to the quantum of damages.
6. Judgment on admission filed by the claimant on February 18, 2010, was on May 5, 2010 entered into the Judgment Book of the Supreme Court at volume 749 folio 123.
7. The 1st defendant was never served and was not a party to the assessment hearing.

THE ACCIDENT AND ITS AFTERMATH

8. The claimant at the time of the accident was sitting on his mother's lap in the back seat of the taxi. They were seated immediately behind the driver, the 1st defendant. As they reached the vicinity of the Tropics View Hotel along the Greenvale main road, the motor car driven by the 2nd defendant was seen travelling towards them in the opposite direction. This motor car made a right turn immediately in front of the taxi which caused the two vehicles to collide.
9. As a result of the collision the claimant who was at the time 1 year and 14 days old, hit his head on one of the metal supports for the driver's headrest and sustained a 6cm laceration to his right forehead.
10. The claimant was taken to the Mandeville Regional Hospital where, as disclosed by the medical report of Dr. Joyce Deterville-Thames, received in evidence as exhibit 7, he was treated by having the injury sutured. The claimant was additionally prescribed the analgesic

Cetamol and the antibiotic Amoxil. X-rays of the skull, cervical spine, chest, and right shoulder revealed no fractures. The Outcome/Prognosis was expected to be good.

11. The Claimant was taken to Dr. Ansel Gillman on April 20, 2005 and subsequently. The medical report of Dr Gillman dated August 9, 2010 was received in evidence as exhibit 8 and will be discussed later in the judgment.

THE CLAIM FOR SPECIAL DAMAGES

12. The claimant initially sought special damages of $54 ,000.00 computed as follows:
    a. $12,000 for 6 visits to see Dr. Gillman at $2000 per visit. This claim was supported by receipts tendered and admitted in evidence as exhibits 1 – 6 and dated respectively 17/1/08; 10/02/08; 04/08/08; 28/08/08; 05/09/08 and 10/09/08. (The claim under this head was reduced to $6,000 when counsel for the claimant sought amendments to the Particulars of Claim).
    b. $36,000 for taxi costs for 6 trips to see Dr. Gillman at $6000 per trip. No receipts were tendered in support of this claim.
    c. $6,000 paid in the amounts of $1,500 per week for 4 weeks as payment to Ms. Merline Forbes, the claimant's paternal aunt who provided care for the claimant in the absence of Ms. Kadina Lewis, the claimant's mother. No receipts were tendered in support of this claim.
13. On the question of special damages counsel for the claimant submitted that the sums claimed were proven by the receipts and the evidence of the claimant's mother and were reasonable.
14. Counsel for the defendants countered that the receipts for the visits to the doctor could not be in relation to the accident and that the sum of $12,000, (later reduced to $6,000), should be disallowed. She based this submission on the fact that during cross examination the claimant's mother, Ms. Kadina Lewis, indicated that she had taken the claimant to the doctor on dates in 2005 and 2006 but that she didn't have receipts for those visits. The timing of those visits was buttressed by the evidence elicited in re-examination that the trips to the doctor were at a time when she herself was still suffering the ill effects of the

accident and had swollen knees. The receipts which were tendered were however all for dates in 2008, three years after the incident, visits on which dates counsel for the claimant submitted were not proven to be in relation to the accident.

15. The medical report of Dr Gillman dated August 9, 2010 is actually quite instructive on the matter. The report under the heading "Complaint" indicates that *"I saw this 6 year old male patient on April 20th 2005 for the purpose of this medical report. He was complaining of headache and pain to the right forehead"* (italics mine). Tellingly, in that report the doctor only speaks to one other occasion on which he saw the claimant; stating under the heading "Investigations", *"He visited office one month later when an approximate six cm, scar was seen on his right forehead."*
16. I however accept the evidence of Ms. Lewis that she took the claimant to Dr. Gillman after the accident during 2005 and 2006; evidence which was not challenged but relied on by counsel for the defendants. Ms. Lewis further testified that she took the claimant to Dr. Gillman from 2005 right through to 2008 for checkups after the accident and that she took him to Dr. Gillman in 2008 for headaches. However, given the nature of Dr. Gillman's report in which he references only the visit of April 20, 2005 and a follow up visit one month later, there is no support for the contention that the visits in 2008 were in relation to the after effects of the unfortunate accident. Therefore while it is common ground that there were about six trips to Dr. Gillman in 2005 – 2006 as a consequence of the accident, no proof of the costs of these office visits during that period has been adduced. The claim for $12,000 for this item, (subsequently reduced to $6,000 as discussed later), is therefore disallowed.
17. In relation to the damages claimed for the taxi trips to Dr. Gillman, counsel for the defendants cited the well established principle in **Lawford Murphy v. Luther Mills** (1976) 14 JLR 119 at page 121H. There Hercules J.A. cited with approval the dictum of Lord Goddard C.J. in the case of **Bonham-Carter v. Hyde Park Hotel Limited** (3) (1948) 64 T.L.R. at page 178 where the Learned Chief Justice said,

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

18. Counsel for the defendants however also recognised that this strict principle has been tempered in some respects and cited the case of **Grant v. Motilal Moonan Ltd and Another** (1988) 43 WIR 372, a case from the Court of Appeal of Trinidad and Tobago. In that case a car driven by the second respondent and owned by the first respondent crashed into the house of the appellant damaging several articles. The special damages were particularised in the pleadings. No appearance was entered nor defence filed by the respondents. The appellant obtained judgment in default. At the assessment hearing before the Master the appellant produced a list of the articles damaged and the prices she had assigned for each. She had no receipts, could not state when they had been purchased and admitted they had not been valued by a valuator. The respondents did not challenge the prices, but submitted there needed to be strict proof of the values. The Master held that the value had not been so proved and awarded and "ex gratia" payment of $6,000. On appeal to the Court of Appeal it was held allowing the appeal, that although special damages must be pleaded, particularised and proved strictly, the appellant had prima facie established the cost of the articles. As the respondents had not attempted to challenge the values placed on them the only courses of action properly open to the Master were to accept the appellant's claim in full or to apply her mind judicially to each item and its value; as the values were not unreasonable, the claim of $22,044 for special damage would be allowed in full.
19. While the case of **Grant** cited by counsel is persuasive authority there is binding authority from the Jamaican Court of Appeal demonstrating that there are circumstances which commend a relaxation of the rule of strict proof. In the well known case of **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 that dealt inter alia with proof of loss of earnings Wolfe J.A. (Ag.), (as he then was), upheld the approach of the trial judge who took cognisance of evidence from the respondent concerning his loss of earnings without supporting documentary proof. At page 176 Wolfe J.A. opined:

> There is support for the approach which the judge adopted. At paragraph 1528 of McGregor on Damages 12th Edition the learned Author states:
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> > "However, with proof as with pleading, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen, L.J., laid this down in the leading case on pleading and proof of damage, Radcliffe v. Evans [1892] 2 Q.B. 524 (C.A.).

In relation to special damage he said:

> The character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. *As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."* (Emphasis added)

Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J., referred to as "the vainest pedantry".

This Court observed in S.C.C.A. 18/84 *Central Soya Jamaica Ltd. v. Junior Freeman* (unreported) per Rowe, P., that:

> "In casual work cases it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence."

This principle is no less applicable to a plaintiff involved in the sidewalk vending trade. This is a small scale of trading. Persons so involved do not engage themselves in the keeping of books of accounts. They buy, and replenish their stock from each day's transaction. They pay their domestic bills from the day's sale. They provide their children with lunch money and bus fares from the day's sales without regard to accounting.

20. The extract from **Walters'** case while addressing the specific issue of loss of earnings underpins a wider principle. Some claimants will be unable to provide documentary proof of genuine claims for special damages given the nature of informal business practices they engage in and certain types of day to day transactions they conduct. In such business practices and day to day transactions the keeping of accounts and the provision of receipts are not regular operational features. The principle in **Walter's** case has been applied in a number of cases including by Anderson J in the unreported case of **Ezekiel Barclay v Clifford Sewell** CLB 241 of 2000, (July 13, 2001), by Sykes J in the unreported case of **Owen Thomas v Constable Foster and the Attorney General of Jamaica** CLT095 of 1999, (January 6, 2006), and more recently by Sykes J in the unreported case of **Kenroy Biggs v. Courts Jamaica Limited and Peter Thompson** HCV 00054/2004, (January 22, 2010).

21. In **Thomas'** case at paragraph 17, Sykes J deplored the view that *"persons of a particular social class should not be expected to prove special damages strictly"*. Rather in each situation the correct approach recommended by the learned judge was that, *"...the particular circumstances be examined to see if the case is an appropriate one for relaxation of the strict rule rather than base the decision on perceived habits of different social groups."*
22. In the circumstances of the **Thomas** case, in allowing a claim for transportation costs of $2,500 where no receipts were provided, Sykes J further observed at paragraph 17, *"It is well known in Jamaica that many of our transport operators do not provide receipts to passengers and the cost seems reasonable."*
23. In the instant case, applying the reasoning from **Thomas,** it is well known that many chartered taxis routinely operate without providing receipts. Receipts may sometimes be provided on request but it is clear no such request was made in this case. It is not hard to fathom that at the time of taking the claimant to the doctor for treatment and checkups, the need to obtain receipts to prove that expenditure would not have been uppermost in the mind of Ms. Lewis.
24. To her credit counsel for the defendants despite her challenge to the evidence of the costs of doctor's visits in 2008 acknowledged that there would have been need for Ms. Lewis to take the claimant to the doctor in 2005 to 2006. Her only concern was the amount claimed. Instead of the claimant's sum of $6000 per round trip she proposed that a sum of $600 per round trip was more reasonable.
25. I have considered the evidence and contrasting submissions on this point. I do not accept that the sum was in the amount of $6000 per round trip in 2005 -2006 for a journey which on the evidence took about 25 minutes one way. However the figure proposed by counsel for the defendants is on the other hand too low, especially as Ms. Lewis testified that the taxi would wait on them to take them on the return journey home. In all the circumstances I find that a sum of $1,500 per round trip should be allowed. The evidence is that there were six such trips. The total sum allowed under this item is therefore $9,000.

26. The analysis in relation to the claim for expenses for taxis in the absence of receipts is also applicable to the claim for the expenses associated with hiring Ms. Forbes as caregiver for the claimant. Ms. Lewis in her evidence indicated she paid Ms Forbes $3,500 per week, $1,500 of which was for taking care of the claimant. Ms. Forbes provided no receipts for the money paid. Counsel for the defendants while taking no issue with the absence of receipts, suggested a figure of $800 per week for this service was more reasonable.
27. I do not find the sum of $1,500 per week unreasonable. The claimant was just over the age of one year at the time of the accident and children at one year old require a lot of supervision; moreso a child in the position of the claimant who was recovering from a laceration to the forehead. I will therefore allow the sum of $1,500 for four weeks yielding a total of $6,000.
28. The total sum allowed for special damages is therefore $15,000.

THE CLAIM FOR GENERAL DAMAGES

29. Mercifully the injury in this case was not that serious. There is no evidence of any long term disability. The incidence of the claimant having headaches as a by-product of the accident, testified to by Ms. Lewis has not been medically proven.
30. The lasting damage proven is a scar which I have seen and which in my opinion is not very unsightly, though there is a medical recommendation from Dr. Gillman that plastic surgery could be sought to "correct the scar..."
31. Counsel for the claimant proffered two cases to assist the court in arriving at an appropriate figure. The first was **Beverly Griffiths and Delvin Griffiths (a minor suing by his mother and next friend Beverly Griffiths) v. Leroy Campbell** Suit No C.L 1996 G 123, *Khan's Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica, Volume 4* at page 153. There the 7 year old complainant suffered nine quite serious injuries including loss of consciousness, a puncture wound to the back of the head with resulting permanent bald patch, two 4 cm lacerations to the face each of which caused a permanent cosmetic disfigurement and where there was the need for future surgical intervention. The award of $220,000 (June 1997) for pain and suffering updated using the Consumer Price Index (CPI)

for January 2011 would be $850, 207. This case provides very limited assistance, save that the award in the instant case will have to be considerably lower as the sole injury in no way approaches the seriousness and number of injuries in the cited case.

32. The second case "at the low end" as submitted by counsel for the claimant is **Trevor Benjamin v Henry Ford et al** HCV02876 of 2005, (March 23, 2010). In **Trevor Benjamin** the claimant, an adult, was involved in a motor vehicle accident that caused him to suffer soft tissue injury, which from the discussion in the case appears to have been a whiplash injury. The award of $700,000 updated using the January 2011 CPI is $752, 466. There is however no similarity between this and the instant case either in terms of injuries or the age of the parties involved and it therefore does not assist the court.
33. Counsel for the claimant submitted that in light of the evidence and the cited cases an award of $800,000 would be appropriate.
34. Counsel for the defendants also cited two cases to assist the court in arriving at an appropriate award. The first case is **Charley Brown v Byron Cummings and Owen Miller** CL1989/B0261, (January 10, 1992), found at page 61 of *Assessment of Damages for Personal Injuries by Harrison and Harrison*.
35. In the **Charley Brown** case, the plaintiff suffered lacerations and abrasions to the face; fracture of the left mandible and left cheekbone; and multiple abrasions over the body, including the upper and lower limbs. There was also permanent deformity of the left side of the face and disability of the function of the jaw. The award of $50,000 updated using the January 2011 CPI is $639, 481. The case was cited by counsel in relation to the lacerations and abrasions to the face and counsel submitted that the extent of the other injuries should make the award in the instant case much lower.
36. The second case **Raymond Shaw v Michael Gordon** CL 1989/S037, (July 23, 1992) extracted on the same page of *Harrison and Harrison* as the previous case, discloses injuries as follows: trauma to the face which resulted in lacerations to the cheek, forehead, chin and neck and also throat irritation and hoarseness. The award in this case was $25,000 which updated is $252, 254. This was however a consent judgment and the court is acutely aware of the limited guidance consent judgments can provide in influencing awards made in

contested matters. The fact that undisclosed and varied considerations may influence consent awards always has to be borne in mind and this makes then generally unsuitable to be relied on without reservation as precedents.

37. Counsel for the defendants submitted that an award of $350,000 would be appropriate in the instant case.
38. Having considered the nature of the injury in this case and those in the cases cited, I find that the injuries in the **Beverley Griffiths** and **Charley Brown** cases are more serious, (in the case of **Beverley Griffiths** significantly moreso), than that in the instant case. Though the lacerations in the **Raymond Shaw** case are more in number there is no indication as to their size and whether any permanent cosmetic disfigurement was resultant as in the instant case. In any event I have already noted the caution the court should exercise in placing reliance on the **Raymond Shaw** case, it being a consent award.
39. Having considered all the evidence, the submissions and the cases cited I find that the appropriate award for pain and suffering in this case should be $400,000.

AMENDMENT TO THE PARTICULARS OF CLAIM

40. Before outlining the final order there is one issue which remains to be addressed. I indicated at the outset of this judgment, under the section dealing with the background to the claim, that I would return to the issue of the amendments sought to the Particulars of Claim.
41. The need for the amendment arose through what was clearly a clerical or administrative error. In the motor vehicle accident in which the claimant was injured, his mother Ms. Kadina Lewis who brought this claim as the claimant's next friend was also injured. She pursued a separate claim on her own behalf. In the preparation of the Amended Particulars of Claim for this matter inadvertently the particulars of her injuries and special damages were appended instead of those of the claimant herein.
42. As indicated earlier this error was not discovered until after the evidence and submissions were completed. It was then noted by the court and brought to the attention of counsel. Of significance is the fact that all the evidence — the witness statement of Ms. Lewis received

as her evidence in chief, and the medical reports and receipts for medical expenses tendered and admitted in evidence as exhibits — correctly relate to the claimant. The cross examination by counsel for the defendants also focussed on the items of special damages sought to be proven in relation to the claimant: namely his medical expenses; transportation costs; and the costs of his home care. The court invited submissions from counsel on the issue of the necessary amendments.

43. Counsel for the claimant filed a Notice of Intention to Amend Particulars of Claim on February 17, 2011. The amendments sought correctly reflected the injury to the claimant but under special damages only sought damages for medical expenses which curiously were reduced to $6,000 from the figure of $12,000 which receipts had been proffered to support. This reduction was ultimately of no significance however, given that as recorded earlier in this judgment, I disallowed any sum for medical expenses. Counsel for the claimant during submissions made an oral application to add particulars of claim in relation to the sums claimed for transportation ($36,000) and for care provided for the claimant for four weeks ($6,000).
44. Counsel for the claimant relied on the authorities of **Peter Salmon v Master Blends Feeds Ltd** C.L. 1991S163, (October 26, 2007); **Gloria Moo Young and Erle Moo Young v Geoffrey Chong, Dorothy Chong and Family Foods (In Liquidation)** SCCA 117 of 1999, (March 23, 2000); and **Leeman Anderson v The Attorney General & Christopher Burton** CLA017 of 2002 (July 16, 2004).
45. Counsel for the claimant submitted that based on the authorities and the circumstances in this case the amendment should be allowed as no prejudice would be suffered by the defendants. No issue of prejudice arose as the correct injury was noted in the medical reports attached to the Notices of Intention to Tender in Evidence Hearsay Statements made in Documents filed on July 12 and August 26, 2010. The defendants were therefore not taken by surprise and in fact the correct medical reports had been tendered in evidence without being challenged by the defendants.
46. Further, it was submitted that the application was made in good faith and allowing the amendments sought would not affect the issues for determination before the court. The

amendments would not yield to the claimant an unexpected advantage nor would they in any way affect the defence being advanced. The court was also asked to take note of the fact that counsel on either side had submitted on the question of damages based on i) the content of the correct medical reports; and ii) items of relevant special damage sought to be proven in evidence. The submissions were not based on the injuries and special damages erroneously noted in the pleadings.

47. Counsel for the defendants did not resist the application to amend the particulars of injuries and of special damages. Counsel however rested on her submissions outlined earlier in which the sums claimed for the items of special damage, (medical expenses, transportation costs and costs of home care), were challenged.

48. Though the amendments were not resisted, the court has to ensure that the amendments should properly be granted. The power for the court to permit amendments to a statement of case in a situation such as this is governed by rule 20.4 (2) of the Civil Procedure Rules 2002 as amended in 2006. This rule provides that "Statements of case may only be amended after a case management conference with the permission of the court."

49. In the **Peter Salmon** case one of the issues was whether the writ having been filed within the limitation period, but the limitation period having now expired, an amendment should be allowed to the particulars of injuries. Sykes J relying on the decision of the court of appeal in ***Judith Godmar v Ciboney Group Limited*** S.C.C.A. 144 of 2001 judgment delivered July 3, 2003, made a distinction between an amendment that disclosed more about an injury pleaded during the limitation period and one that sought to make a claim for an injury which had not been pleaded within the limitation period. Based on that distinction the learned judge allowed the amendments which merely provided more details of the injuries pleaded but disallowed one amendment which sought to add an injury that appeared to be new.

50. In the **Godmar** case, the claimant applied to add a new claim for post traumatic stress disorder which she alleged flowed from the defendant's tortious act. She also sought to include additional sums as special damages. The Court of Appeal allowed the amendment sought for special damages being the cost of further treatment for injuries pleaded during

the limitation period, but disallowed the claim for post traumatic stress disorder, holding that it was a claim for a new injury being made after the expiration of the limitation period.

51. In the instant case the injury in the proposed amendment is "new", (at least in relation to the 3rd defendant who was only ever served with the incorrect amended claim form), in that the amendment seeks to substitute the injury suffered by the claimant for that of the injuries suffered by his mother and next friend, inadvertently pleaded due to a clerical or administrative error. The limitation period has however not expired, the injury having occurred on the 15th April 2005. The fact that the injury is new is therefore no bar to the amendment. As the special damages "follow the injury" the special damages would also be newly pleaded. However utilizing the same reasoning as that applied in relation to the injury, as the limitation period has not passed, the fact that they are new would not by itself defeat the amendments sought.
52. The case of **Leeman Anderson v The Attorney General and Christopher Burton** CLA017 of 2002 (July 16, 2004) was relied on by the claimant for the proposition that given the extent of the disclosure in the instant case the defendant would not have been taken by surprise in relation to the nature of the case that was to be met.
53. In **Leeman's** case Sykes J (Ag.) as he then was, had to consider whether a claim for exemplary damages was adequately pleaded in the section of the pleadings headed "Particulars of Exemplary Damages" which read in part, *"the aforesaid actions of the Second Defendant…were arbitrary and oppressive".* In the case of **The Attorney General & Another v Noel Gravesandy** (1982) 19 JLR 501 reviewed in **Leeman's** case it was observed that a claim for exemplary damages must be specifically pleaded together with the facts relied on if such a claim were to succeed. In **Leeman's** case Sykes J (Ag.) opined that, the adjective "aforesaid" could only be referring to paragraph 4 where the claimant alleged that he was beaten up without reasonable or probable cause." The learned Judge therefore concluded, "The standard of Gravesandy has been met". Sykes J (Ag.) however went on to observe at page 12 of the judgment that, as the witness statement of Mr. Anderson made it very clear what he was complaining about, "I would have been prepared to hold that the defendants had notice of the claim for exemplary damages as well as the facts being relied on if it had

happened that the statement of claim had only the claim for exemplary damages but did not plead the facts being relied on."

54. In arriving at this position Sykes J (Ag.) relied on the following dicta of Lord Woolf MR considering the impact of the new rules in the defamation case of **McPhilemy v Times Newspapers Limited** [1993] 3 All ER 775 at 792-793:

> The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.

55. If the amendment in the instant case not been sought within the limitation period it would have required consideration of whether or not the observations of Sykes J (Ag.) in **Leeman's** case and of Lord Woolf MR in **McPhilemy's** case, could, in the peculiar circumstances of the instant case, have been successfully relied on. That consideration would have been necessary particularly in light of the principle outlined in the **Peter Salmon** and **Godmar** cases, which prohibits amendments that seek to insert new claims after the expiration of the limitation period. As such contemplation is not necessary for a decision on the application, it will not be pursued.

56. The case of **Gloria Moo Young** is not of particular assistance as there the amendment sought and obtained by the respondents was held by the Court of Appeal to have been in bad faith and an attempt to adjust the defence to meet the evidence given by the appellants. No such allegation of bad faith or of "remodeling the claim" has been made in the instant case. All parties proceeded on the basis of the case they thought had been pleaded but inadvertently had not. The amendments prayed sought to align the pleadings with the case presented by the claimant which case had been anticipated and engaged by the defendants.

57. An authority not cited by the claimant but which is of assistance to the court is that of **Rohan Collins and Sonia Collins v Wilbert Bretton (on behalf of Claudette Davis-Bonnick)** E227 of 2002, (May 26, 2003). In **Collins'** case the respondent and the 1st applicant had come before the court on a Vendor and Purchaser Summons requesting a number of declarations. The 2nd applicant did not appear and the 1st applicant appeared in person without his counsel. Time was allowed for the 1st applicant to enquire as to the reason for his counsel's absence, but no reason was advanced. The 1st applicant had also filed no affidavit in response. The court took the view there was no good reason for an adjournment and required the 1st applicant to proceed on his own behalf. At the end of the respondent's case the 1st applicant did not produce an affidavit nor did he give oral evidence, which had the effect of closing his case.

58. On the following day May 7, 2003 the 1st applicant filed a notice of change of attorney and an application under Part II of the Civil Procedure Rules 2002 requesting permission to present a response to the court on the basis that his failure to be ready was due to his inability to pay his previous attorney which was a circumstance outside of his control. The 1st applicant also filed an affidavit in response to the Summons and was thus now ready to proceed.

59. Jones J (Ag.), (as he then was), viewed the issue as analogous to an application to amend pleadings (statements of case) prior to the making of a final order. The learned judge recognized that, as dictated by rule 1.2, the exercise of his discretion had to be governed by the overriding objective under rule 1.1, that of "enabling the court to deal with cases justly." The learned judge relied on the case of **Charlesworth v Relay Roads Limited** [1999] 4 All ER 397 in which Neuberger J at page 401 highlighted that on an application to amend a statement of case or to call evidence for which permission is required, assessment of the justice of the case involved two competing factors. Firstly, that it is desirable that a party is allowed to advance every point he reasonably desires to put forward, so that he does not believe he has suffered injustice especially if the decision goes against him. If any damage suffered by the opposing party may be compensated by costs a powerful case would normally be made out for the amendment to be allowed. Secondly, the court had to

consider whether the success of an application to amend or to call new evidence would interfere with the administration of justice and the interests of other litigants who had cases waiting to be heard.

60. Having weighed the competing interests, Jones J (Ag.) held it was in the interest of justice to permit the 1st applicant to put in his evidence and make submissions in advance of judgment. However, having concluded that the "applicants conduct amounted to unreasonable and prejudicial conduct deserving of an extreme sanction", the learned judge ordered that costs be paid within 10 days of the date of the order, otherwise the application would be dismissed.
61. The **Collins** case is helpful. It clearly demonstrates by analogy the principle that, in an appropriate case, amendments can be permitted even when all that remains is for judgment to be delivered.
62. Having reviewed the authorities I find it was indeed appropriate that the application was not resisted given the reasons outlined in the submissions of counsel for the claimant and the jurisprudence which has developed in this area. The defendants were in no way misled concerning the nature of the evidence to be relied on. Counsel for the defendants cross-examined Ms. Lewis in some detail concerning the way in which the injury to the claimant was sustained, as well as the circumstances surrounding the incurring of the medical expenses, transportation and caregiver costs claimed. The amendment sought was merely to ensure that the particulars of claim accurately reflected the particulars of injury and special damages on which all parties were focused throughout the hearing.
63. The amendments therefore did not yield to the claimant any unexpected advantage nor did they in any way prejudice the defence being advanced. The amendments sought are therefore allowed. Having not found the conduct of the claimant to be "unreasonable and prejudicial" as was the finding in the **Collins** case, the court does not consider it appropriate to penalize the claimant in costs for the amendments sought and granted.

CONCLUSION

64. The claimant has not succeeded in establishing most of the special damages claimed as the sum for medical expenses has been disallowed and the transportation costs allowed are greatly reduced from the amount advanced. The general damages awarded reflect the fact that the sole injury is not that serious, no permanent disability has resulted and the cosmetic disfigurement caused relatively minor. The amendments sought to the Particulars of Claim are granted, they being necessary for the fair disposition of the matter and no injustice being occasioned to the defendants thereby.

65. The court therefore made the following Order on March 3, 2011:

    a. Amendment granted in terms of Notice of Intention to Amend Particulars of Claim filed on February 17, 2011 and oral application to amend Particulars of Special Damages made on February 18, 2011;
    b. Special Damages awarded in the sum of $15,000 with interest at the rate of 6% per annum from April 15, 2005 to June 21, 2006 and at the rate of 3% per annum from June 22, 2006 to March 3, 2011;
    c. General Damages (Pain and Suffering) awarded in the sum of $400,000 with interest at the rate of 3% per annum from April 2, 2009 to March 3, 2011;
    d. Costs to the claimant to be agreed or taxed.